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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

RABAGO, ROBERTO

ART UNIT	PAPER NUMBER
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1713

DATE MAILED: 02/05/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/965,568

Applicant(s)

DEKMEZIAN ET AL. 

Examiner

Rob Rábago

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-- Th MAILING DATE of this communication appears on th cover sh t with the corr spondenc address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
- 4a) Of the above claim(s) 9-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 and 21-28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-28 are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                  | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). ____.  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____. | 6) <input type="checkbox"/> Other: _____.                                   |

## DETAILED ACTION

### *Restriction/Election*

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-8 and 21-28, drawn to processes of making polyethylene, and the resultant polymer, classified in class 526, subclass 119.
  - II. Claims 9-20, drawn to metallocene catalyst systems, classified in class 502, subclass 117.

Inventions II and I are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (MPEP § 806.05(h)). In the instant case the metallocene catalyst system would be useful in hydrogenation reactions.

Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

During a telephone conversation with Mr. Osborne McKinney on 1/27/2003, a provisional election was made with traverse to prosecute the invention of group I, claims 1-8 and 21-28. Affirmation of this election must be made by applicant in replying to this Office action. Claims 9-20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

### ***Specification***

2. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required:

(a) The range "60,000-200,000" as recited in claims 2 and 21.

(b) The limitation "unimodal" as recited in claims 25-28.

### ***Claim Objections***

3. Claims 2-8 and 25-28 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. The value of MI has been set at 0.7 g/10 min. in claim 1, and therefore claim 2 and all claims dependent thereon fail to further limit the parent claim as regards MI because the dependent claims have increased the range of MI. Claim 1 will be examined including the limitation the MI=0.7. However, in an effort to expedite prosecution, claims 2-8 and 25-28 will be further examined assuming that the MI value in claim 1 will be amended to be consistent with the dependent claims.

### ***Claim Rejections - 35 USC § 112***

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 1-8 and 21-28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

(a) In claims 1-6, 21, 22 and 25-28, the phrase "substantially unblended" is indefinite because the specification has set forth four different definitions at paragraph 031.

(b) Process claims 6-8 and 22-28 include no process steps, and therefore it cannot be determined which process applicant is intending to claim.

(c) Claims 25-28 recites the limitation "the unimodal molecular weight". There is insufficient antecedent basis for this limitation in the claim because the concept of being unimodal has not been previously introduced in these claims or the parent claims. If this property is a new limitation in claims 25-28, then the claim language should reflect that intention. ✓

### ***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in-

(1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effect under this subsection of a national application published under section 122(b) only if the international application designating the United States was published under Article 21(2)(a) of such treaty in the English language; or

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(2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that a patent shall not be deemed filed in the United States for the purposes of this subsection based on the filing of an international application filed under the treaty defined in section 351(a).

7. Claims 2-6 and 25-28 are rejected under 35 U.S.C. 102(e) as being anticipated by Lue et al. (US 6,207,606).

Claims 2, 3, 6, 25 and 26 are described by Example 8, which describes a gas phase polymerization of ethylene and hexene using a supported metallocene catalyst to make a polymer with all claimed properties (see also Table 3). Claims 2, 3, 4, 6 and 25-27 are described in Comparative Example 1, which describes a gas phase polymerization of ethylene and hexene using a supported metallocene catalyst to make a polymer with all claimed properties (see also Table 3). Claims 5 and 28 are described in Example 12, which describes a gas phase polymerization of ethylene and hexene using a supported metallocene catalyst to make a polymer with all claimed properties (see also Table 4). The reference reports MIR as 54.9 for Ex. 12, which when rounded to a two-digit number as in applicants' claim (i.e., 55), meets the range of 55-75. Although CDBI has not been reported for Example 12, this property is deemed to be inherent because the measured value exceeds 60 for every other example for which this property has been reported. It is further observed that the reference polymers have not reported the degree to which the polymers are "unimodal" as required in claims 25-28; however, this property is also deemed to be inherent because the polymers are stated to have a narrow molecular weight distribution and narrow composition distribution (col. 15, lines 57-65); accordingly, there is no reason to believe that the

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polymers produced would be bimodal or multimodal. The burden of proof is shifted to applicants to show that the applied reference examples do not contain the claimed CDBI and unimodality. In re Fitzgerald, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

8. Claims 2-4, 6 and 25-27 are rejected under 35 U.S.C. 102(e) as being anticipated by Holtcamp et al. (US 6,420,580).

Example 14, catalyst C describes a gas phase polymerization of ethylene and hexene using a supported metallocene catalyst to make a polymer with all claimed properties (see also Table 1). Although the reference has not reported the degree to which the polymers are "unimodal" as required in claims 25-27, this property is deemed to be inherent because the polymers are stated to have a narrow molecular weight distribution (col. 7, lines 38-42) and furthermore because they have been made by a catalyst which comprises a single supported metallocene; accordingly, there is no reason to believe that the polymers produced would be bimodal or multimodal. The burden of proof is shifted to applicants to show that the applied reference examples do not contain the claimed unimodality. In re Fitzgerald, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

9. Claims 2-4 and 25-27 are rejected under 35 U.S.C. 102(e) as being anticipated by Crowther et al. (US 6,339,134).

Examples 23 and 30 describe a gas phase polymerization of ethylene and hexene using a supported metallocene catalyst to make a polymer with all claimed

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properties (see col. 22, lines 6-9 and 55-59; Table 4). Although the reference has not reported the degree to which the polymers are "unimodal" as required in claims 25-27, this property is deemed to be inherent because the polymers are stated to have a narrow molecular weight distribution and narrow composition distribution (col. 15, lines 14-25) and furthermore because they have been made by a catalyst which comprises a single supported metallocene; accordingly, there is no reason to believe that the polymers produced would be bimodal or multimodal. The burden of proof is shifted to applicants to show that the applied reference examples do not contain the claimed unimodality. *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

### ***Double Patenting***

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 1-8 and 21-28 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 5-8 and 21-24 of copending Application No. 09/680,644. Although the conflicting claims are



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not identical, they are not patentably distinct from each other because the instant claims are more broad than the copending claims; a genus is not patentable over a sub-genus. Regarding instant claims 25-28, the additional limitation of the polymer being "unimodal" does not confer separate patentability over the copending claims because a substantially identical set of polymers are being claimed in the two applications.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Conclusion***

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Rob Rábago whose telephone number is (703) 308-4347. The examiner can normally be reached on Monday - Friday from 9:30 am - 3:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Wu can be reached at (703) 308-2450. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Rob Rábago  
Examiner  
Art Unit 1713

RR  
January 28, 2003

